

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

signed 7/17/01

MARIA KALUZYNSKI,

Plaintiff

v.

DON ARMSTRONG, GARFIELD HOLMES,
PETER STEWART, LYNNE DOUCETTE,
THE CRISIS AND COUNSELING
CENTERS, INC., BARBARA KIM, and DR.
NEAL COLAN,

Defendants

Civil No. 00-267-B-C

ORDER DENYING MOTION TO AMEND THE COMPLAINT

Before the Court for action is Plaintiff's Motion to Amend Her Complaint herein (Docket No. 24). The motion was filed nineteen (19) days after the filing of a Recommended Decision of the Magistrate Judge (Docket No. 22) in which it is recommended that the Court grant Defendants' Motions to Dismiss as to all claims founded on federal law and decline to exercise its supplemental jurisdiction over the remaining claims based on state law. *Id.* at 20-21; *see also Collins v. Nuzzo*, 244 F.3d 246 (1st Cir. 2001). The motion is clearly intended to be the predicate for Plaintiff's attack on the Recommended Decision and Plaintiff's effort to defeat its acceptance by the Court. Affidavit of William D. Robitzek (Docket No. 27) and Plaintiff's Motion to Amend (Docket No. 24) at 2.

DISCUSSION

Leave to amend a complaint should be freely given when justice so requires. Fed. R. Civ. P. 15(a); *see Foman v. Davis*, 371 U.S. 178 (1962). However, the right to amend rests in the court's discretion and should be denied where the amendment would be futile in its effect, would cause prejudice to the adverse parties, where there has been undue delay in seeking the amendment, or where the amendment is sought in bad faith. *See Invest Almaz v. Temple-Inland Forest Products Corp.*, 243 F.3d 57, 71 (1st Cir. 2001); *Resolution Trust Corp. v. Gold*, 30 F.3d 251, 253 (1st Cir. 1994). The granting of a motion to amend is "by no means automatic," *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663, 666 (5th Cir.), *cert. denied*. 454 U.S. 1098, 102 S. Ct. 672, 70 L. Ed. 2d 640 (1981). In acting on the motion, the court may consider such factors as undue delay, bad faith, dilatory motive by the moving party, undue prejudice to the opposing party, and the futility of the proposed amendment. *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993) (citing *Foman*, 371 U.S. at 182). The court must have a "substantial reason" to justify the denial of the amendment. *Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985).

The intended effect of the proposed amendment is to alter the original allegations of the Complaint (on which the Magistrate Judge relied in her Recommended Decision) as to the circumstances preceding the shooting of Plaintiff's decedent, Sidor. In the original Complaint (Docket No. 1), Plaintiff alleges that Sidor attacked Officer Holmes with a sword, precipitating his shooting by Officer Armstrong. The pertinent allegations of the Complaint in this respect are:

30. All the officers exited their vehicles, but only Troopers Armstrong and Holmes approached the back door of the house. There they encountered a dog on a chain. As they backed up, Trooper Holmes saw a person he believed was Mr. Sidor looking out the back window. This person came out the back door, waving a stick or

object in his hand. The man started yelling in a foreign language and waving the stick at the officers. The Troopers continued to back up. They sought no assistance. They did not get Trooper Armstrong's K-9, which was in the Cruiser. They did not leave.

31. Instead, Trooper Armstrong drew his service revolver and began yelling at the man, in English, to drop the stick. The man kept coming and pulled the stick apart, revealing the stick to be a sword of some sort in a scabbard. Keeping hold of the scabbard in one hand, the man continued to wave the sword with the other and hit Trooper Holmes three times on his arm and shoulder. As the man swung his arm, Trooper Armstrong shot the man and continued shooting until the man, later identified as Mr. Sidor, lay dead.
32. Mr. Sidor's mother came running out, screaming at the Troopers in Polish. The Troopers grabbed her arms so that she could not strike them. Officer Doucette kicked the sword under the cruiser so that the woman could not reach it. Shortly thereafter, plaintiff arrived. It was plaintiff's husband who informed Ms. Kim and the translator at the Emergency Room that the police had killed Mr. Sidor.

Complaint (Docket No. 1) at 8-9.

The allegations of the proposed amended complaint (attached to Plaintiff's Motion to Amend Her Complaint, (Docket No. 24)) restructure the events preceding the shooting to assert that Mr. Sidor did not unsheathe the sword and made no attack on any of the officers before being shot by Officer Armstrong and that the officers, themselves, unsheathed the sword and confiscated it after Mr. Sidor was shot because of their concern that Mr. Sidor's mother would get access to it and use it to attack the officers. The pertinent allegations of the proposed amended complaint in this respect are:

30. All the officers exited their vehicles, but only Troopers Armstrong and Holmes approached the back door of the house. There they encountered a dog on a chain. As they backed up, Trooper Holmes saw a person he believed was Mr. Sidor looking out the back window. This person came out the back door, waving a stick or object in his hand. The man started yelling in a foreign language and waving the stick at the officers. The Troopers continued to back up. They sought no assistance. They did not get Trooper Armstrong's

K-9, which was in the cruiser. They did not leave.

31. Jerzy Sidor exited the house carrying an antique sword he used for woodcutting, in its scabbard, in his left hand. Jerzy Sidor was right-handed. The officers continued to approach Jerzy who came to a stop on the other side of concrete blocks in front of a truck. Mrs. Sidor watched the entire course of events, which she said happened very fast. Jerzy Sidor never raised the sword at the officers and never hit either of them. Jerzy Sidor never took the sword out of the scabbard. Nonetheless, Trooper Armstrong shot Jerzy Sidor and continued shooting until Mr. Sidor lay dead. Sidor was shot while holding the sword, still pointed downward, in his left hand.
32. Mr. Sidor's mother came running out, screaming at the Troopers in Polish. The Troopers grabbed her arms so that she could not strike them. When Mrs. Sidor ran to her son, the Troopers removed the sword from the scabbard, dropped the scabbard to the ground and took the sword to their cruiser because they claimed they thought she might use it against them. The police reports state that Officer Doucette kicked the sword under the cruiser so that the woman could not reach it. Shortly thereafter, plaintiff arrived. In the tape recorded interview she and her mother were forced to give even as Jerzy Sidor still lay on the ground, Mrs. Sidor can be heard saying "Jerzy not hit police. Why didn't they ask me?" and repeatedly, in the background, "did not beat police, not beat, police shot". Plaintiff's husband informed Ms. Kim and the translator at the Emergency Room that the police had killed Mr. Sidor.

Id.

Thus, the amendment removes from the Complaint those allegations that Mr. Sidor was shot while attacking Officer Holmes with a sword, on which Magistrate Judge Kravchuk relied in assessing the Motions to Dismiss as against Officer Armstrong and his assertion of qualified immunity.¹ Clearly, the effort is out of time. Magistrate Judge Kravchuk was

¹Here, it is clear that if the Court were to grant Plaintiff's Motion to Amend the Complaint, it would still not state a claim against those Defendants other than Defendant Armstrong. The only person alleged in the proposed amended complaint to have used force against Mr. Sidor (in fact, in either version of the complaint) is Officer Armstrong. The officer's seizure of the sword after the shooting is specifically alleged by Plaintiff to be "because they claimed they thought she [Mrs. Sidor] might use it against

entitled to rely on Plaintiff's own Complaint in assessing the adequacy of the allegations therein to withstand Defendants' Motions to Dismiss. It is properly to be presumed that Plaintiff and her counsel had a good-faith belief in the truth of the factual allegations set forth therein and that it had been prepared with due diligence and reasonable attention to proper investigation of the circumstances of the shooting. *See* Fed. R. Civ. P. 11.

Magistrate Judge Kravchuk could properly presume, when setting to her task of addressing the Motions to Dismiss, that the Complaint reflected all facts which were then known to Plaintiff or her counsel or of which, in the exercise of due care and diligence, they should have had knowledge which were necessary to a sufficient statement of her claims.

I have considered closely Plaintiff's assertion that the facts newly alleged in the proposed amended complaint came to her knowledge, or that of her attorney, only after she had read the Recommended Decision to her mother, Mrs. Sidor. I disbelieve that assertion because it is clear that Plaintiff was herself present when the tape was made which was the basis of Detective Baker's Summary of Interview with respect to the circumstances of the shooting as known to Plaintiff and Mrs. Sidor. In fact, Plaintiff acted as the interpreter for the officer for her mother in the course of that taped interview. She necessarily thereby gained knowledge of what her mother said in the interview with respect to the

them." Proposed Amended Complaint at ¶ 32. There is no allegation made in the proposed amended complaint that the officers had any improper motive in seizing and unsheathing the sword. There is no allegation disputing the alleged "claim" by the officers that it was seized for their own protection. There is no allegation that these Defendants in any way, before or after the shooting, conspired to the accomplishment of any improper purpose with Officer Armstrong or with each other. There is no claim, or suggestion of a claim, that these Defendants or, for that matter, Officer Armstrong attempted in any way to conceal the circumstances of the shooting.

The Court, in accomplishing a *de novo* review of the Defendants' Motions to Dismiss (other than that of Defendant Armstrong) on the basis of the proposed amended complaint, would find, therefore, that the only Defendant whose exposure to liability could conceivably be affected by the changed allegations proposed by Plaintiff is State Police Officer Armstrong and would conclude that the claims against these Defendants in the proposed amended complaint should be dismissed.

circumstances under which she perceived the shooting to have occurred. What she said was recorded, it is undisputed, on the tape that is now put forward as the source of the late-arrived information. Clearly, the information on the tape was well known to Plaintiff since shortly after the shooting occurred and, if not known to her attorney, it clearly should have been known to him by virtue of her obligation to disclose pertinent information known to her to her attorney and his obligation to use due care and diligence in investigating the facts of his client's case for purposes of preparing an accurate and truthful complaint.²

The motion is obviously interposed at this late date in an attempt to avoid this Court's acceptance of the Magistrate Judge's Recommended Decision. The record reflects that Plaintiff has had ample opportunity to investigate her claims, indeed, to discover the very information that is the basis for the proposed amendment, and that she, in fact, did so. Further, she could long ago have moved for amendment of the Complaint before the opposing counsel, and the Magistrate Judge, had expended their resources and efforts, and those of this Court, in addressing motions on a predicate that Plaintiff, herself, had put forth as a basis for her claims.

²It is significant to note that the Summary Report by Detective Baker, which Plaintiff's attorney acknowledges he had before preparing the Complaint, Affidavit of William D. Robitzek (Docket No. 27) ¶ 2 at 2, specifically states that it is a summary of an interview with Robitzek's client, the Plaintiff, and her mother, Mrs. Sidor. It specifically refers to the fact that the interview was recorded and that "the reader is directed to the audio tape recording of the interview for its entirety." Summary of Interview (attached to Affidavit of William D. Robitzek (Docket No. 27). In the Summary, Detective Baker relates that Mrs. Sidor told him "Jerzy [Sidor] not beat police. Police see he have it, knife. They shot." *Id.* at unnumbered page 3. He also relates that he was told "Jerzy Sidor was not moving when she heard the shots fired . . . after the shots were fired, the police grabbed the knife and took it to the cruiser." *Id.* at unnumbered page 2.

All of this is directly contrary to the assertion made by Plaintiff's counsel under oath that "[t]here was nothing in the summary of the interview the investigator purportedly had with Mrs. Sidor following the shooting to alert me to the fact that she might have a different tale to tell." Affidavit of William D. Robitzek (Docket No. 27) ¶ 2 at 1-2. On the contrary, the clear indication that there was in existence an audio tape recording of the only witness to the shooting made close in time to its occurrence should, in the exercise of due care and diligence, have whetted in counsel an unquenchable appetite to know what she had said about the shooting. This is especially true when the Summary indicates specifically that Mrs. Sidor had said her son was not moving when she heard the shots, the very assertion Plaintiff now belatedly seeks to bring forward.

Having carefully considered the record, the Court is seriously concerned, in the circumstances, with whether this alleged evidence is now put forth in good faith to be relied upon when it was obviously not taken seriously or given weight, moment, or significance by Plaintiff and her counsel previously. I conclude that there is a dilatory motive behind the obvious effort to bring late salvation to Plaintiff's case by scuttling the possible acceptance of the Recommended Decision. I find countenancing this amendment would make a shambles of the effort in this Court to enforce the timely pleading rules of the Court and would cause undue and improper prejudice to Defendants by nullifying wholly their diligent and effective efforts to date to respond by the Motions to Dismiss (and their briefings thereon) to the allegations of a Complaint on which they and Magistrate Judge Kravchuk were fully entitled to rely as an accurate statement of Plaintiff's own version of the facts of the case. Further, allowance of the amendment would require, in all likelihood, that the case go forward to a substantial discovery phase in order to probe into whether there is support for this newly arrived version of the facts of the shooting, thus defeating the purposes of the qualified immunity that has now all but matured in favor of Officer Armstrong and the other State Police officers as a result of the Recommended Decision.

All of the foregoing concerns and circumstances are found by the Court to be "substantial reasons" to deny Plaintiff's Motion to Amend the Complaint.

Accordingly, the Motion to Amend is hereby **DENIED**.

So **ORDERED**.

GENE CARTER
District Judge

Dated at Portland, Maine this 17th day of July, 2001.

MARIA KALUZYNSKI, Individually	WILLIAM D. ROBITZEK
and in her capacity as	784-3576
Personal Representative for	[COR LD NTC]
the Estate of JERZY SIDOR	BERMAN & SIMMONS, P.A.
plaintiff	P. O. BOX 961
	LEWISTON, ME 04243-0961
	784-3576

v.

DON ARMSTRONG	LEANNE ROBBIN, AAG
defendant	[term 06/22/01]
	[COR LD NTC]
	MELISSA REYNOLDS O'DEA, ESQ.
	[COR LD NTC]
	ASSISTANT ATTORNEY GENERAL
	STATE HOUSE STATION 6
	AUGUSTA, ME 04333-0006
	626-8800

GARFIELD HOLMES	LEANNE ROBBIN, AAG
defendant	[term 06/22/01]
	(See above)
	[COR LD NTC]
	MELISSA REYNOLDS O'DEA, ESQ.
	(See above)

[COR LD NTC]

PETER STEWART
defendant

LEANNE ROBBIN, AAG
[term 06/22/01]

(See above)

[COR LD NTC]

MELISSA REYNOLDS O'DEA, ESQ.
(See above)

[COR LD NTC]

LYNN DOUCETTE, Individually
and in her official capacity
as police officer with
Monmouth Police Department
defendant

EDWARD R. BENJAMIN, JR.

[COR LD NTC]

THOMPSON & BOWIE

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CRISIS AND COUNSELING CENTERS INC

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INC

[COR LD NTC]

defendant

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BARBARA KIM, Individually and
in her official capacity as
caseworker with The Crisis and
Counseling Center
defendant

JON HADDOW, ESQ.

(See above)

[COR LD NTC]

NEAL COLAN, DR, Individually
and in his official capacity
as Director of The Crisis and
Counseling Center
defendant

JON HADDOW, ESQ.

(See above)

[COR LD NTC]